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In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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Respondents express surprise that, having accepted the premise that the National Environmental Policy Act is applicable to the maintenance and storage of nuclear weapons, the Department of Defense should complain of the decision below. They assert that we have prematurely tendered the question whether public development, disclosure and dissemination of an environmental impact statement is required in circumstances like those involved in this case, insisting that the court of appeals "did not direct, or even address itself to, which portions of the EIS *must* be made public." Resp. Br. In Opp. 13-15. Only the briefest reply is called for.

In our view, there is no ambiguity about the ruling below. It expressly requires the "preparation of an EIS, *available*

to the public, generally assessing the impact [of storing nuclear weapons at West Loch]." Pet. App. 5a-6a (emphasis added). To be sure, such an EIS may be "hypothetical"—"without conceding, that the facility will be put to the use for which it has been made capable"—but it must disclose "factual information as to the consequences of storage to any specific extent * * * based on a series of hypotheses covering the range of options" presented by the particular facility. Pet. App. 6a. And, albeit hypothetically, the public assessment must consider the four factors identified by respondents. See Pet. App. 3a, 5a, 6a-7a. In sum, the court below has mandated that the Military Services publish a site-specific, detailed impact statement, revealing the potential effects of any possible nuclear storage, whenever a facility is capable of being put to such use.[1]

Our concern is that this rule, in many instances, would (1) require disclosure of classified information; (2) create a serious and unnecessary burden in preparing "hypothetical" impact statements for unreal situations in order to minimize revealing the actual sites and extent of nuclear storage; and (3) mislead and unsettle the public by suggesting possible risks where there are, in fact, no nuclear weapons stored, or a lesser number or less dangerous types, than is hypothetically assumed in the EIS. We have explained why this is so in our petition (at 12-19) and need not repeat our submission. We stress only that our quarrel with the decision below is not insofar as it requires the decision-maker to fully inform himself before acting, but only insofar as it compels public disclosure, in all cases, of

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[1] Presumably, the EIS must indicate the kind and scope of destructive impact for each category of nuclear weapon that may be stored at the facility and its susceptibility to accidental detonation. Most, if not all, of such information is plainly "restricted data" within the meaning of the Atomic Energy Act.

the fact or likelihood of nuclear storage at a specific site and the risks and potential effects of an accidental detonation, positing the full "series of hypotheses" respecting the number and types of nuclear weapons capable of storage there. For the reasons stated in our petition, however, we believe the latter requirement presents a substantial question meriting review here.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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